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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DANTE PRENTICE,

Defendant and Appellant.

C065897

(Super. Ct. Nos.  
09F08165, 09F01377)

A jury convicted defendant Dante Prentice of two residential burglaries, evading a peace officer, evading a peace officer by driving in the opposite direction of traffic, and assault with a deadly weapon on a peace officer. On appeal, he claims the trial court erred by failing to instruct sua sponte on the lesser related offense of accessory after the fact and in not staying the sentence for evading a peace officer by driving

in the opposite direction of traffic. The People concede that the sentence should have been stayed.

We accept the People's concession and shall modify the judgment to stay execution of sentence for evading a peace officer by driving in the opposite direction of traffic. We conclude the trial court had no sua sponte duty to instruct on an uncharged, lesser related offense; indeed, the court could not give such an instruction without the consent of the prosecutor. We shall affirm the judgment as modified.

#### **BACKGROUND**

##### **The Estacio Residence Burglaries**

Pamela Estacio had been acquainted with defendant for seven or eight years at the time of trial. Their relationship was close and affectionate. He referred to her as "Grandma." Over the years, defendant had visited Estacio at her residence numerous times; the most recent visit had been approximately five days prior to the first burglary of her home.

At around 10:00 a.m. on October 28, 2009, Estacio saw defendant walking down the street near her home. Estacio pulled over to say hello and to ask defendant when he would visit her again. When defendant asked Estacio what time she would return home, she replied that she would be back at noon. Defendant never visited Estacio, and she did not see him again until the first day of trial.

Estacio returned home within 15 minutes, well before the noon hour, to find that someone had broken the window to her grandson's bedroom and stolen a video game console and its

attachments, video games, athletic hats, and a small amount of jewelry. The burglar had broken the sliding pane of a two-pane window, creating room to reach through the break in the glass and bend, then remove, the interior window lock.

On November 3, 2009, Estacio left her home around 9:50 a.m. or 10:50 a.m. to pick up her granddaughter from school. Her house is situated in a cul-de-sac on a narrow street. As she was leaving her home, a vehicle drove up from behind and sped very quickly past her car. Because the vehicle was traveling so quickly she noticed only that it was a blue Chrysler, the people in the car were black, and there appeared to be people in the front and back seats. Estacio was away from her home for approximately 40 or 45 minutes.

Estacio returned home with her granddaughter and parked her car in the garage. She attempted to enter the house through the door between the garage and the house but found the door locked. Because she does not lock that door, she ordered her granddaughter out of the garage for her safety. Estacio entered the home, retrieved the cordless telephone, hurried back out, and called the police.

When a sheriff's deputy arrived and Estacio reentered the home, she noticed it had been burglarized again and in the same manner as the October 28, 2009, burglary. The burglar entered her granddaughter's bedroom by breaking the sliding pane of a two-pane window, reaching in, and accessing the window's interior lock to gain entry; the lock had been taken off and thrown to the ground. The burglar had stolen a box of blank

checks, prescription medication, and a pack of cigarettes. As Estacio described to the deputy the car she had seen, her granddaughter said it sounded like a car defendant or his brother drove.

### **November 3, 2009, Burglary of the Wharry Residence**

Ira Wharry did not know defendant prior to November 3, 2009. He left his home around 9:30 a.m. and returned about 11:00 a.m. to find that his home had been burglarized. The point of entry was a window in Wharry's home office. The burglar had removed the screen to a two-pane window, broken the nonsliding pane, reached in, and opened the sliding pane.

The burglar had stolen Wharry's 35-pound safe, which contained passports, cash, stocks and bonds, and other items. The intruder also took night vision goggles from the hall closet, a laptop computer and camera from Wharry's home office, and quarters from the closet in the master bedroom. In addition, two video game systems were stolen from the living room.

### **The Car Chase**

On November 3, 2009, after the burglaries, defendant and others attempted to cash one of the personal checks stolen from the Estacio residence. The police learned of the transaction and arrived at the check-cashing store as defendant waited in a blue Chrysler in the parking lot.

A high-speed chase ensued. During the chase defendant failed to stop at a number of stop signs. To avoid a car that was blocking his lane, defendant crossed the two-lane road,

driving against traffic. Police pursued defendant through residential neighborhoods and onto Interstate 80; his speed varied from 35 to 110 miles per hour.

Speeding down the freeway, defendant swerved in and out of all lanes, passing cars on both the right and left "hard" shoulders. At one point, defendant pulled up next to a law enforcement vehicle and made a "wild violent left hand turn" toward the vehicle. The chase that began on Watt Avenue in Sacramento ended in Vacaville after defendant swerved across all four lanes of traffic, clipped a civilian's car, and came to rest in the dirt on the right side of the freeway. Defendant was forcibly removed from the vehicle and arrested after he refused to exit. The blue Chrysler was searched immediately following the chase. Officers seized two red cloth gloves, a pair of black gloves, a black knit cap, two books of checks, a large gray safe, a laptop computer, a car alarm, and a pair of blue jeans.

### **Theory of Defense**

Defendant testified on his own behalf. He did not recall October 28, 2009, because nothing special happened that day.

On November 3, 2009, defendant woke up around 7:30 a.m. at Marqueze Nash's home. After running some errands, he received a call from Nash asking for a ride in exchange for \$15 in gas money.

Defendant drove Nash to an apartment complex near defendant's home and waited in the car for seven to 10 minutes.

Nash returned to the car with a laptop, asked defendant to open the trunk, and then went back into the apartment complex.

Later, defendant drove Nash and his girlfriend to a check-cashing business to cash a check. Defendant testified that he knew the laptop and the check were both stolen.

Although defendant denied ever entering the Wharry residence, once Nash returned to the vehicle with the laptop and wearing gloves, he knew what Nash was doing. Defendant admitted he knew that Nash had broken into a home, but defendant believed he was only guilty of aiding and abetting since he did not enter the home.

### **Verdict and Sentencing**

In June 2010 a jury convicted defendant of assault with a deadly weapon on a peace officer (Pen. Code, § 245, subd. (c) -- count one), first degree residential burglary of Pamela Estacio's home (Pen. Code, § 459 -- count two), first degree residential burglary of Ira Wharry's home (Pen. Code, § 459 -- count three), unlawful operation of a motor vehicle with intent to evade a peace officer (Veh. Code, § 2800.2, subd. (a) -- count four), and willful and unlawful attempt to flee and elude a peace officer while operating a motor vehicle upon a highway opposite the lawful movement of traffic (Veh. Code, § 2800.4 -- count five).

After the jury deadlocked on count six, first degree residential burglary of Estacio's home on October 28, 2009, the court dismissed that count. The court sentenced defendant to

eight years in state prison.<sup>1</sup> Defendant filed a timely notice of appeal.

## **DISCUSSION**

### **1. Failure to Instruct on Accessory After the Fact**

Defendant claims his defense at trial was that Nash had committed the November 3, 2009, burglaries and his own involvement was limited to picking up Nash and driving him away with the stolen property. Defendant asserts the trial court's failure to sua sponte instruct on accessory after the fact violated his state and federal constitutional rights to trial by jury and due process of law.<sup>2</sup> We disagree.

“““It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the

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<sup>1</sup> Defendant was on probation when convicted of counts one through five. Following conviction on those counts, he was sentenced to the midterm of two years for violation of probation, to run concurrently with the eight year prison sentence.

<sup>2</sup> Penal Code section 32 provides: “Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.”

jury's understanding of the case.' [Citations]"" (People v. Daya (1994) 29 Cal.App.4th 697, 712.)

A lesser *included* offense is subsumed by the charged offense and as such is a "general principle of law" that requires proper instruction to the jury, even when no request for the instruction has been made. (People v. Birks (1998) 19 Cal.4th 108, 117-118 (Birks).) However, evidence of an uncharged, lesser *related* offense triggers no such duty. (People v. Schmeck (2005) 37 Cal.4th 240, 291-292 (Schmeck); Birks, at p. 136.)

Neither the state nor federal Constitution requires that a trial court instruct on uncharged, lesser related offenses, even upon request. (People v. Rundle (2008) 43 Cal.4th 76, 147-148; Birks, *supra*, 19 Cal.4th at p. 124; Hopkins v. Reeves (1998) 524 U.S. 88, 96-97 [141 L.Ed.2d 76].)

Here, defendant was not charged with being an accessory after the fact and explicitly concedes that the offense is not a lesser included offense to the crime of burglary.<sup>3</sup> Rather, it was an uncharged, lesser related offense.

Defendant insists the trial court is obliged to instruct on a defendant's theory of defense and was obliged in the present case to instruct on accessory after the fact as defendant's only

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<sup>3</sup> Penal Code section 459 provides, in relevant part: "Every person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary."

defense theory. Although this general proposition is correct, defendant's contention fails for two reasons.

First, in contrast to lesser included offenses, the trial court's duty to instruct sua sponte on a particular defense is more limited and arises only if there is substantial evidence supporting the defense and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case. (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) Here, the record is devoid of evidence to support a defense of accessory after the fact, defendant did not rely on the defense, and it is inconsistent with the theory of defense advanced at trial.

Defendant testified he had nothing to do with the burglaries at the Estacio residence. Regarding the first burglary, defendant testified there "[w]asn't nothing special about that day to remember," and "I never been to her house that morning." As to the second burglary, defendant admitted he was in the neighborhood at the exact time of the second burglary but claimed no participation in the crime. Trial counsel argued during closing that the prosecution had failed to meet its burden of proof regarding the Estacio burglaries. Defendant claimed no involvement in the Estacio burglaries, not that he became involved after the fact.

As for the Wharry burglary, defendant testified he was an "aid[er] and abett[or]," not that he was "only" an accessory after the fact.

Defendant testified he drove Nash to the apartment complex near the Wharry residence, determined for himself that Nash was committing a burglary, and waited for Nash to complete the crime. He acknowledged his understanding that by "[s]taying there" he was aiding and abetting. Defense counsel argued that Nash entered the home and removed the property all by himself but that defendant "helped Mr. Nash steal." The jury, after hearing defendant's testimony, convicted him of the Wharry residence burglary.

At trial, defendant did not rely on accessory liability as a defense, and such a defense was both inconsistent with his theory of the case as presented to the jury and unsupported by the evidence. By arguing now on appeal that the trial court's failure deprived him of his due process right to present a complete defense, defendant attempts to do indirectly what he cannot do directly, i.e., demand a jury instruction on an uncharged, lesser related offense. (See, e.g., *People v. Kraft* (2000) 23 Cal.4th 978, 1064-65.) His argument is forestalled by the California Supreme Court's holding in *People v. Whisenhunt* (2008) 44 Cal.4th 174 that reached and disposed of an identical contention. "An accessory instruction was not essential to defendant's defense. Through defendant's testimony and defense counsel's closing argument, the jury was fully apprised of the defense theories that it was [Nash] rather than defendant who [burglarized the homes]." (*Id.* at p. 213.)

Defendant was free to argue to the jury the theory of accessory after the fact. (*Schmeck, supra*, 37 Cal.4th at

pp. 291-292; *Birks, supra*, 19 Cal.4th at p. 136, fn. 19

["nothing in our holding prevents the defendant from arguing in any case that the evidence does not support conviction of any charge properly before the jury, and that complete acquittal is therefore appropriate"].) He did not.<sup>4</sup>

Thus, contrary to defendant's assertion, the lack of an instruction on accessory after the fact did not deprive him of an adequate opportunity to present his claims.

There is another, more fundamental obstacle to defendant's argument: accessory after the fact is a discrete *offense*, not a *defense*. A defendant is liable for being an accessory after the fact when he or she "harbors, conceals or aids" a principal after a felony is complete. (Pen. Code, § 32.) Being an accessory to burglary is not a defense to principal liability for the commission of a burglary -- it is a separate offense. (Cf. *People v. Valentine* (2006) 143 Cal.App.4th 1383, 1388 ["the offense of receiving stolen property is not a *defense* to robbery; rather, it is a theory of criminal liability based on a different offense"]; *People v. Jennings* (2010) 50 Cal.4th 616, 668 ["[b]eing an accessory to murder is not a defense to aiding

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<sup>4</sup> This failure undermines his claim on appeal that this was his "only theory of defense" and therefore a sua sponte instruction was required. Reversible error cannot be predicated upon a theory hatched belatedly after trial for the apparent purpose of prosecuting the appeal. (See, e.g., *People v. Wade* (1959) 53 Cal.2d 322, 335; *People v. Montoya* (1994) 7 Cal.4th 1027, 1050.)

and abetting the commission of murder—it is a separate criminal offense”].)

A defendant can be convicted of both burglary and accessory after the fact if he or she aids the principal both before and during, as well as after, the commission of the offense. (See, e.g., *People v. Riley* (1993) 20 Cal.App.4th 1808, 1815.) Because accessory liability is not a defense to principal liability, defendant’s posttrial “defense” that he was guilty of the uncharged “offense” of accessory after the fact could not have invoked the trial court’s duty to sua sponte instruct on a theory of defense.

## **2. Penal Code Section 654**

Defendant argues that under Penal Code section 654 the trial court erred in imposing a consecutive term for count five, evading an officer by driving in the opposite direction of traffic.<sup>5</sup> Defendant contends the court should have imposed a stay on the sentence because it arose out of a single course of conduct that included count four, evasion in willful disregard for the safety of persons or property. The People concede the issue and we agree.

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<sup>5</sup> Penal Code section 654 provides, in relevant part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

In sentencing defendant on his conviction for count five, the trial court stated, "the Court sees [counts four and five] as independent matters that do not directly call for [Penal Code section] 654 to be applied." The People concede that the sentence on the count five conviction must be stayed because section 654 precludes multiple punishments for a single course of conduct.

It is plain from the record that defendant engaged in a course of conduct with the single intent and objective of evading the police. His conduct in driving opposite the lawful flow of traffic was part and parcel of his attempt to flee the pursuing officers. The sentence should have been imposed and then stayed. (See *People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) We will modify the judgment accordingly. (Pen. Code, § 1260; see *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473.)

#### **DISPOSITION**

The sentence on the conviction for evading a peace officer by driving in the opposite direction of traffic (count five) is stayed. As thus modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment reflecting this modification and forward a certified copy thereof to the Department of Corrections and Rehabilitation.

\_\_\_\_\_, RAYE, P. J.

We concur:

\_\_\_\_\_, ROBIE, J.

\_\_\_\_\_, MAURO, J.